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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Peninsula Communications, Inc.)
)
Applications for Renewal of License for FM)
Translator Stations)
)
K272DG and K285EG, Seward, Alaska,) File Nos BRFT-951124UT, YU, YW, ZE
K285EF, Kenai, Alaska,) through ZH, ZJ, ZK, BRFT-970930U5, YA
K283AB, Kenai/Soldotna, Alaska,) through YH
K257DB, Anchor Point, Alaska,)
K265CK, Kachemak City, Alaska,) Facility ID Nos.: 52161, 52155, 52151,
K272CN, Homer, Alaska; and) 52164, 52160, 52158, 52162, 52154 and
K274AB and K285AA, Kodiak, Alaska) 52148
)
And)
)
Applications to Assign the Licenses of)
)
K272DG and K285EG, Seward, Alaska,)
K285EF, Kenai, Alaska;) File Nos. BALFT-970701TR through TZ
K283AB, Kenai/Soldotna, Alaska,)
K257DB, Anchor Point, Alaska;)
K265CK, Kachemak City, Alaska,)
K272CN, Homer, Alaska, and)
K274AB and K285AA, Kodiak, Alaska)
)
From Peninsula Communications, Inc to)
Coastal Broadcast Communications, Inc)

MEMORANDUM OPINION AND ORDER AND ORDER TO SHOW CAUSE

Adopted: May 10, 2001

Released: May 18, 2001

By the Commission.

1. In this Order, we dismiss as untimely a pleading styled "Rejection of Conditional License Renewal and Assignment of License Grants," filed on March 15, 2000, by Peninsula Communications, Inc. ("Peninsula"). We also, on our own motion (1) rescind the 1995 and 1997 conditional grants of the above-captioned renewal applications; (2) rescind the conditional grants of the above-captioned assignment applications; (3) dismiss the 1995 and 1997 renewal applications, cancel the call signs and terminate the operating authority for the translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point, K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak; (4) grant unconditionally the above-captioned renewals for translator stations K272DG and K285EG, Seward; and (5) order Peninsula pursuant to section 316 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 316, to show cause why its licenses for translators K272DG and K285EG, Seward, should not

be modified¹ Our reasons follow

I. Background

2. This case primarily involves our eligibility and signal delivery requirements for FM translators, which appear in 47 C.F.R. §§ 74.1231(b), 74.1232(d). Briefly, those provisions provide that other-area or non-fill-in translators may only retransmit primary FM station signals received by the translator directly over-the-air and that authorization for an "other-area" or "non-fill-in" translator will not be granted to persons interested in or connected with the commercial "primary FM station."² These rules became effective on June 1, 1991, with pre-existing translators required to comply no later than June 1, 1994.³ As the Commission explained in establishing these rules, translators are intended to provide "supplementary service to areas in which direct reception of FM radio broadcast stations is unsatisfactory due to distance or intervening terrain barriers," and the governing rules are meant "to ensure that the translator service does not adversely affect the operation of FM radio broadcast operations." *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, *supra* note 3, 8 FCC Rcd at 5093.

3. Peninsula is the licensee and assignor of the captioned FM translator stations K272DG and K285EG Seward, K285EF, Kenai, K283AB, Kenai/Soldotna, K257DB, Anchor Point, K265CK, Kachemak City; K272CN, Homer, and K274AB and 285AA, Kodiak, Alaska. Peninsula's nine translator stations are all non-fill-in stations that rebroadcast primary stations licensed to Peninsula.⁴ The Seward translators, K272DG and K285EG, have received and continue to receive their primary stations' signals for rebroadcast by methods other than directly over-the-air. In addition, as explained herein, the Seward translators are operating in conformance with our rules pursuant to waivers, while the seven remaining translators are operating in violation of our translator rules and, except for the Kodiak translators,⁵ have been since at least June 1, 1994.

¹ As explained herein, we believe the Seward translators currently have the benefit of waivers of sections 73.1231(b) and 73.1232(d) of the Commission's rules, which we believe can best be addressed by following the procedures set forth in section 316 of the Act and section 1.87 of the Commission's rules.

² An "other-area" or "non-fill-in" translator is one whose coverage contour extends beyond the protected service contour of its primary station. See 47 C.F.R. §74.1201(h) and (i). A "primary" FM station is the station whose signal a translator retransmits. 47 C.F.R. §74.1201(d).

³ See *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212 (1990), *modified*, 6 FCC Rcd 2334 (1991), *recon. denied*, 8 FCC Rcd 5093 (1993).

⁴ The Kodiak translators ceased rebroadcasting Peninsula's KPEN-FM, Soldotna and KWVV-FM, Homer, Alaska on November 12, 1997, and remained silent between that date and October 29, 1998. On October 29, 1998, the Kodiak translators began rebroadcasting the signal of a noncommercial FM translator in Kodiak in accordance with our translator rules. See *December 1998 MO&O*, 13 FCC Rcd at 23998 n. 13. However, according to a "Request for Investigation," filed February 12, 2001, by Kodiak Island Broadcasting Company, Inc. ("KIB"), licensee of stations KVOK and KRXX(FM), Kodiak, the Kodiak translators again began to rebroadcast Peninsula's stations KPEN-FM and KWVV-FM in late January 2001. KSRM, Inc., licensee of stations KSRM, Soldotna, and KWHQ(FM), Kenai, filed comments in support of KIB's request on February 15, 2001. On March 15, 2001, Peninsula responded to KIB's "Request for Investigation" and reported that the Kodiak translators had recently recommenced the rebroadcast of stations KPEN-FM and KWVV-FM.

⁵ See footnote 4, *supra*.

4. On November 24, 1995, Peninsula filed license renewal applications for the nine translator stations ("1995 renewal applications"). On September 11, 1996, the staff, in addressing petitions to deny filed against six of the nine 1995 renewal applications,⁶ determined that Peninsula had operated the non-Seward translator stations in violation of our translator rules' ownership restrictions since June 1, 1994. See 47 C.F.R. § 74.1232(d). The staff also concluded that, although the Seward translator stations had previously received waivers of this rule, continued waivers were not warranted. Finally, the staff deferred action on the 1995 renewal applications for a period of 60 days to allow Peninsula to file assignment applications for the nine translators in order to come into compliance with 47 C.F.R. § 74.1232(d). See *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B4-AJS (Chief, Audio Services Division, Mass Media Bureau, September 11, 1996) ("*September 1996 letter*"). Ultimately, acceptable assignment applications were filed on July 1, 1997.⁷

5. On November 6, 1997, the staff granted the applications to assign the licenses for all nine translators. So that the assignments could go forward, the staff also granted all nine 1995 renewal applications, conditioned upon consummation of the authorized assignments. Finally, the staff conditioned consummation of the assignments on grant of the recently-filed 1997 renewal applications. See *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B3-BSH (Chief, Audio Services Division, Mass Media Bureau, November 6, 1997) ("*November 1997 staff decision*"). The *November 1997 staff decision* stated that failure to meet the divestiture condition would render grant of the 1995 renewal applications null and void. Peninsula did not seek reconsideration or review of the *November 1997 staff decision*. However, Cobb Communications, Inc., Glacier Communications, Inc., KSRM, Inc., and King Broadcasters, Inc. (collectively referred to as "Petitioners") filed both a petition for reconsideration and an application for review of the *November 1997 staff decision*. As was the case with respect to the 1995 renewal applications, Petitioners did not challenge the license renewals or assignments for K257DB, Anchor Point; K265CK, Kachemak City; or K272CN, Homer.

6. In December 1998, the Commission dismissed and denied, respectively, Petitioners' petition for reconsideration and their application for review. *Peninsula Communications, Inc.*, 13 FCC Rcd 23992 (1998) ("*December 1998 MO&O*"). Essentially, Petitioners had argued that the staff should have revoked Peninsula's licenses because of the rule violations and that the staff erred in concluding instead that Peninsula could sell the subject translator stations. In our decision, we noted that, in the absence of an unresolved basic character qualification issue, "there can be no doubt as to the Commission's authority to cure or remedy [the violation of the ownership restrictions] by granting the renewal applications conditioned on divestiture of the translators." *December 1998 MO&O*, 13 FCC Rcd at 23996. In the *December 1998 MO&O*, we also granted Peninsula's 1997 renewal applications.⁸

⁶ The six challenged translator stations were K272DG and K285EG, Seward; K285EF, Kenai; K283AB, Kenai/Soldotna; and K274AB and K285AA, Kodiak.

⁷ Peninsula and Coastal Broadcast Communications, Inc. ("Coastal") originally filed applications to assign the nine translator stations on November 14, 1996. Those applications were dismissed as patently not in accordance with the Commission's rules. See *Letter to Jeffrey D. Southmayd, Esq., et. al.*, Ref. No. 1800B3-BSH (Chief, Audio Services Division, Mass Media Bureau, June 17, 1997) ("*June 1997 Staff Decision*"). The *June 1997 Staff Decision* afforded the parties ten business days to file assignment applications that would fully comply with the Commission's rules. Peninsula and Coastal then filed the above captioned assignment applications.

⁸ The brevity of the time period between the filing of the 1995 and 1997 renewal applications was the result of the Commission's decision to modify FM translator license terms to run concurrently with the terms of (continued . . .)

conditioned on consummation of the authorized assignments, and denied requests for waiver of 47 C.F.R. § 74.1231(b), the over-the-air delivery restrictions, filed by Coastal for the Kodiak translators. However, with respect to the Seward translators, we determined that discontinuation of the previously granted waivers of 47 C.F.R. § 74.1231(b) would require termination of the operations of those translators and would not serve the public interest at that time since the translators provided Seward's only FM service. We noted that a construction permit had been issued to William M. Holzheimer, one of the principals of Glacier Communications, Inc., for a new FM station in Seward. In regard thereto, we stated that, if and when that full service FM station commenced operation, we "may consider whether the circumstances under which the waivers were granted have so changed as to warrant termination of the Seward translator operations." See *December 1998 MO&O*, 13 FCC Rcd at 23997-99.

7 Peninsula and Glacier sought reconsideration of the *December 1998 MO&O*. Peninsula disputed the conditional grants of the 1995 and 1997 renewal applications. It also contested the determination that the seven subject translators other than the ones in Seward had been operating in violation of 47 C.F.R. § 74.1232(d) since June 1, 1994 and the determination that continued waiver of 47 C.F.R. § 74.1232(d) was not warranted for the two Seward translators. In addition, Peninsula, but not Coastal, requested reconsideration of the denial of requests for waivers of 47 C.F.R. § 74.1231(b) for the Kodiak translators. Finally, Peninsula objected to our statement that we would consider whether to terminate the Seward translators' 47 C.F.R. § 74.1231(b) waivers if and when an unbuilt, full service FM station authorized in Seward commenced operations. Glacier argued that Peninsula's waivers of the over-the-air reception rule, 47 C.F.R. § 74.1231(b), should be discontinued for the Seward translators.

8 On February 14, 2000, we dismissed Peninsula's petition for reconsideration of the *December 1998 MO&O*. *Peninsula Communications, Inc.*, 15 FCC Rcd 3293 (2000) ("*February 2000 MO&O*"). We ordered Peninsula to consummate the authorized assignments within thirty days of the decision, and we directed the staff to rescind the conditional grants of the 1995 and 1997 license renewal applications, cancel the relevant call signs and terminate the translators' operating authority if Peninsula did not comply with the divestiture requirement. *February 2000 MO&O*, 15 FCC Rcd at 3294. We also granted Mr. Holzheimer's application for a license to cover the construction permit for full power FM station KPFN(FM), Seward, Alaska and terminated the waivers of the 47 C.F.R. § 74.1231(b) signal delivery rule for the subject Seward translators effective 60 days from the release date of the order. *Id.* at 3295-96. In so doing, we took note of Glacier's argument that the Peninsula translators were taking radio revenues out of the small community of Seward, creating financial difficulties for the new FM full service station, KPFN(FM), and we concluded that permitting Peninsula to continue to deliver a distant signal to Seward would be a clear detriment to the continued viability of full service broadcast stations licensed to Seward. *Id.* On February 23, 2000, Peninsula filed with the Commission a motion to stay the effect of the *December 1998 MO&O* and the *February 2000 MO&O* pending the filing and resolution of an appeal it intended to file.⁹

9. On March 8, 2000, Peninsula filed an appeal of the Commission's *February 2000 MO&O* with the United States Court of Appeals for the District of Columbia Circuit ("Court"). That same day,

(Continued from previous page)

FM primary stations. See *In the Matter of Modifying Renewal Dates for Certain Stations Licensed under Part 74 of the Commission's Rules and Revising FCC Form 303-S, Report and Order*, 9 FCC Rcd 6504 (1994).

⁹ In a supplement to that motion, filed on March 3, 2000, Peninsula attached a letter from Coastal. That letter made plain that Coastal was no longer willing to buy Peninsula's translators for the price agreed upon in 1996.

Peninsula filed an Emergency Motion for Stay of the *February 2000 MO&O* with the Court arguing, *inter alia*, that, pursuant to 47 U.S.C. § 309(k), the Commission was required to grant its renewal applications unconditionally and that its operating authority could be terminated only after a hearing pursuant to 47 U.S.C. § 312.¹⁰ On March 14, 2000, the Court denied Peninsula's Emergency Motion for Stay. On March 15, 2000, Peninsula filed with the Commission the pleading now before us, a "Rejection of Conditional License Renewal and Assignment of License Grants." By order dated July 11, 2000, the Court dismissed Peninsula's appeal without prejudice to refiling following the Commission's resolution of the "Rejection of Conditional License Renewal and Assignment of License Grants."

10. Peninsula's "Rejection of Conditional License Renewal and Assignment of License Grants" is premised on 47 C.F.R. § 1.110. Section 1.110 provides that, "[w]here the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, the action of the Commission shall be considered as a grant of such application unless the applicant shall within 30 days from the date on which such grant is made file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing." In its pleading, Peninsula rejects the action of the Commission granting Peninsula's 1995 and 1997 license renewal applications conditioned on divestiture of the translator licenses and "upon the other conditions contained in the orders." Peninsula also states that it rejects the staff's grant of the 1997 assignment applications "subject to the conditions modifying the licenses for the two Seward stations, and the other conditions placed thereon." Peninsula asserts that, pursuant to 47 C.F.R. § 1.110, the Commission must now vacate its original action on the applications and set the applications for hearing. Peninsula states that it considers the Commission's actions in the *December 1998 MO&O* and *February 2000 MO&O* "vacated *ab initio* as of this date, null, void, and of no further force and effect, and requiring no further action by Peninsula in accordance therewith." Peninsula continues to operate the subject nine translator stations.

II. Discussion

11. After carefully considering all the circumstances, we believe that Peninsula's invocation of 47 C.F.R. § 1.110 is untimely and warrants dismissal. Peninsula's "Rejection of Conditional License Renewal and Assignment of License Grants" was not filed until more than two years after conditional grants of the 1995 renewal applications and 1997 assignment applications, which occurred as a result of the *November 1997 staff decision*. Peninsula did not seek reconsideration of the *November 1997 staff decision*. Rather, Peninsula actually accepted and endorsed the November 1997 conditional grants of the 1995 renewal applications observing that the conditional grants were "fair and consistent with the facts and existing legal precedent for approving such applications." See Peninsula's December 30, 1997 Opposition to Application for Review, at page 8. 47 C.F.R. § 1.110 "does not allow applicants first to

¹⁰ 47 U.S.C. § 309(k)(1) sets forth the standards the Commission must reference in determining whether to renew a license for a broadcast station. Section 309(k)(2) of the Act provides that if the licensee fails to meet one of the renewal standards, the Commission may grant the application subject to appropriate terms and conditions. That section, in conjunction with section 309(k)(3), alternatively provides that the Commission may deny the renewal application after a hearing. As our discussion in paragraph 13, *infra*, makes clear, we believe that the staff's imposition of a divestiture condition upon Peninsula was necessary to correct the serious, ongoing violations of our translator rules with respect to the translators in Anchor Point, Kachemak City, Homer, Kenai, and Kodiak. Finally, inasmuch as we are granting unconditional renewals for the Seward translators, Peninsula's section 309(k) argument relative to those licenses is now moot.

accept a partial grant, yet later to seek reconsideration of its conditions." *Tribune Company v FCC*, 133 F.3d 61, 66 (D.C. Cir. 1998), citing *Central Television, Inc v FCC*, 834 F.2d 186, 190 (D.C. Cir. 1987). An applicant must file a written request rejecting a conditional grant within 30 days from the date on which the conditional grant is made; otherwise, the action of the Commission shall be considered as a grant of the application and that grant is not subject to appeal by the applicant. See *Mobile Communications Corporation of America v FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1996), cert denied, 117 S.Ct. 81 (1996), citing *Central Television, Inc. v FCC*, 834 F.2d 186, 190-91 (D.C. Cir. 1987). Accordingly, we find the "Rejection of Conditional License Renewal and Assignment of License Grants" at issue here to be untimely, and it is hereby dismissed.¹¹ See 47 C.F.R. § 1.110, see also *Capital Telephone Co. v FCC*, 498 F.2d 734, 740 (1974).

12. In light of the dismissal of Peninsula's belated "Rejection of Conditional License Renewal and Assignment of License Grants," we must now determine the fate of Peninsula's translators. In this regard, the failure to consummate the assignments, coupled with Coastal's apparent unwillingness to go forward with the assignments at any time in the foreseeable future, compels the conclusion that the conditions attached to the grants of Peninsula's 1995 and 1997 renewals were not (and likely will never be) met. Consistent with the *February 2000 MO&O*, we could rescind the 1995 and 1997 renewal grants and order Peninsula's translators off the air immediately. However, we believe our ultimate decision should account for the different factual circumstances attending the different sets of translators. Accordingly, on our own motion, we are modifying our *February 2000 MO&O* as set forth in this Order.¹²

13. K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; K285EF, Kenai; K283AB, Kenai/Soldotna; and K274AB and K285AA, Kodiak. The staff correctly concluded in 1996 that Peninsula had been operating these facilities contrary to the requirements of 47 C.F.R. § 74.1232(d) since June 1, 1994. See *September 1996 letter*. To rectify this situation, the *November 1997 staff decision* expressly conditioned grant of the translator stations' 1995 renewal applications on consummation of their assignment to Coastal.¹³ As noted, consummation of the assignments has not occurred and will not occur. Thus, Peninsula has not fulfilled the condition notwithstanding our explicit warning that its failure to divest would result in rescission of the grants of the 1995 and 1997 renewal applications. See *February 2000 MO&O*, 15 FCC Red at 3294. Accordingly, as to these stations, we rescind the conditional grants of the 1995 and 1997 renewal applications, rescind the 1997 conditional assignment grants, dismiss the 1995 renewal applications and dismiss, as moot, the 1997 assignment applications and 1997 renewal applications.¹⁴ *P&R Termer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) (termination of license for failure to meet license condition did not require hearing). Finally, inasmuch as Peninsula's authority to

¹¹ In light of our disposition of the 1995 renewal applications, we need not address the effect of Peninsula's rejection with respect to the 1997 renewal applications. See paragraphs 13-14, *infra*.

¹² In light of our decision to modify our prior order, we do not believe enforcement action with respect to our prior order is warranted. We instruct the staff to move quickly and strongly, however, to recommend or take appropriate enforcement action if there is any non-compliance with the provisions of this order.

¹³ Although the Petitioners filed a petition for reconsideration and application for review of the *November 1997 staff decision* with respect to six of the nine subject translators, Peninsula did not timely contest the *November 1997 staff decision*.

¹⁴ As consummation of the authorized assignments has not occurred and will not occur, we also rescind the 1997 conditional assignment grants for stations K272DG and K285EG, Seward, and we dismiss, as moot, the 1997 assignment applications for those Seward translator stations.

operate these translators has expired, Peninsula must cease operations by 12:00 midnight the day after release of this Order. Further operations by Peninsula after this time may subject it to serious sanctions, including but not limited to forfeitures under section 503(b) of the Act. See also 47 U.S.C. §§ 401, 501 and 502.

14. K272DG and K285EG, Seward ("Seward translators"). The procedural posture of the Seward translators is akin to that of the other seven translators. However, there is one significant difference. In this regard, the staff had explicitly granted Peninsula waivers of 47 C.F.R. §§ 74.1231(b) and 74.1232(d), waivers that we declined to rescind in our *December 1998 MO&O* because of concerns about loss of FM programming to the public. At the same time, however, we also indicated that commencement of operations by a new full service FM station in Seward would justify review of the situation to determine whether the waivers should continue. In our *February 2000 MO&O*, we ordered termination of the Seward waivers within 60 days of the release of that order in light of the commencement of operations of KPFN(FM), Seward. Peninsula has challenged this result in Court and we believe that section 316 of the Act affords the most direct and expedient means of resolving the matter.¹⁵ Accordingly, we will grant unconditionally Peninsula's 1995 and 1997 renewals for the Seward translators. In addition, pursuant to section 316 of the Act, we will order Peninsula to show cause why its Seward translators' licenses should not be modified to discontinue the previously granted waivers of 47 C.F.R. §§ 74.1231(b) and 74.1232(d). Should Peninsula protest the proposed order of modification, we intend to rule on the matter expeditiously.¹⁶ If Peninsula's licenses are modified,¹⁷ we expect it to operate the translators in accordance with those authorizations, and, if it is unable to do so, to terminate their operation immediately.

III. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that Peninsula Communications, Inc.'s "Rejection of Conditional License Renewal and Assignment of License Grants" IS DISMISSED.

16. IT IS FURTHER ORDERED that the conditional grants of the 1995 and 1997 renewal applications filed by Peninsula Communications, Inc. for translator stations K257DB, Anchor Point, Alaska, K265CK, Kachemak City, Alaska, K272CN, Homer, Alaska, K285EF, Kenai, Alaska, K283AB, Kenai/Soldotna, Alaska, K274AB and K285AA, Kodiak, Alaska, and K272DG and K285EG, Seward, Alaska, ARE RESCINDED.

17. IT IS FURTHER ORDERED that the conditional grants of the 1997 applications to assign the licenses for translator stations K257DB, Anchor Point, Alaska, K265CK, Kachemak City, Alaska;

¹⁵ Section 316 of the Act allows us to modify a license following notification to the licensee and according the licensee 30 days within which to protest the proposed order of modification. See also 47 C.F.R. § 1.87.

¹⁶ Any order modifying Peninsula's licenses will be issued by the Commission. If there are substantial and material questions of fact requiring a hearing pursuant to section 316(a)(3) of the Act, the Mass Media Bureau shall designate the matter for hearing. The staff may also decide not to modify the licenses on delegated authority.

¹⁷ We are aware that termination of the waivers of the over-the-air delivery restrictions for the Seward translators may result in termination of service to a number of Alaskan citizens who claim that the service provided by these translators is critical and that the full-service AM and FM stations licensed to Seward will not be adequate substitutes. See Peninsula's March 6, 2000, Statement for the Record with attached letters.

K272CN, Homer, Alaska; K285EF, Kenai, Alaska; K283AB, Kenai/Soldotna, Alaska; K274AB and K285AA, Kodiak, Alaska, and K272DG and K285EG, Seward, Alaska, from Peninsula Communications, Inc. to Coastal Broadcast Communications, Inc. ARE RESCINDED.

18 IT IS FURTHER ORDERED that the 1995 and 1997 renewal applications filed by Peninsula Communications, Inc. for translator stations K257DB, Anchor Point, Alaska, K265CK, Kachemak City, Alaska, K272CN, Homer, Alaska, K285EF, Kenai, Alaska, K283AB, Kenai/Soldotna, Alaska, and K274AB and K285AA, Kodiak, Alaska, ARE DISMISSED

19. IT IS FURTHER ORDERED that the 1997 applications to assign the licenses for translator stations K257DB, Anchor Point, Alaska; K265CK, Kachemak City, Alaska, K272CN, Homer, Alaska, K285EF, Kenai, Alaska, K283AB, Kenai/Soldotna, Alaska, and K274AB and K285AA, Kodiak, Alaska, from Peninsula Communications, Inc. to Coastal Broadcast Communications, Inc. ARE DISMISSED

20. IT IS FURTHER ORDERED that call signs for translator stations K257DB, Anchor Point, Alaska, K265CK, Kachemak City, Alaska, K272CN, Homer, Alaska, K285EF, Kenai, Alaska, K283AB, Kenai/Soldotna, Alaska, and K274AB and K285AA, Kodiak, Alaska, ARE DELETED

21. IT IS FURTHER ORDERED that Peninsula Communications, Inc. SHALL TERMINATE OPERATIONS for translator stations K257DB, Anchor Point, Alaska, K265CK, Kachemak City, Alaska, K272CN, Homer, Alaska, K285EF, Kenai, Alaska, K283AB, Kenai/Soldotna, Alaska, and K274AB and K285AA, Kodiak, Alaska, effective at 12 00 midnight on the day after release of this Order

22 IT IS FURTHER ORDERED that the 1995 and 1997 renewal applications filed by Peninsula Communications, Inc. for translator stations K272DG and K285EG, Seward, Alaska, ARE GRANTED UNCONDITIONALLY.

23 IT IS FURTHER ORDERED that the 1997 applications to assign the licenses for translator stations K272DG and K285EG, Seward, Alaska, from Peninsula Communications, Inc. to Coastal Broadcast Communications, Inc. ARE DISMISSED

24 IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 316(a) and 47 C.F.R. § 1.87, Peninsula Communications, Inc., IS DIRECTED TO SHOW CAUSE why the licenses for translator stations K272DG and K285EG, Seward, Alaska, SHOULD NOT BE MODIFIED

[1.] To terminate waivers of 47 C.F.R. § 74.1231(b), and

[2.] To terminate waivers of 47 C.F.R. § 74.1232(d)

25 Pursuant to 47 C.F.R. § 1.87, Peninsula Communications, Inc. may, not later than 30 days from the release of this Order, file a written protest showing with particularity why the licenses for translator stations K272DG and K285EG, Seward, Alaska, should not be modified as proposed. Any protest will be considered fully before the Commission decides whether to modify the subject licenses. If a hearing is deemed necessary because the protest raises a substantial and material question of fact, the Mass Media Bureau shall designate such hearing in a subsequent order. If no protest is filed by the date referenced above, Peninsula Communications, Inc. will be deemed to have consented to the modification as proposed and the Commission will issue a final order to that effect.

26. IT IS FURTHER ORDERED that the Mass Media Bureau SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Memorandum Opinion and Order and Order to Show Cause to:

Peninsula Communications, Inc.
c/o Jeffrey D. Southmayd, Esquire
Southmayd & Miller
1220 19th Street, N.W., Suite 400
Washington, D C. 20036

Peninsula Communications, Inc.
Post Office Box 109
Homer, Alaska 99603

Chester P. Coleman and Phoenix Broadcasting, Inc.¹⁸
c/o David Tillotson, Esquire
4606 Charleston Terrace, N W
Washington, D C. 20007

Kodiak Island Broadcasting Company, Inc
c/o Henry A. Solomon, Esquire
Garvey, Schubert & Barer
1000 Potomac Street, N W., 5th Floor
Washington, D.C. 20007

KSRM, Inc.
c/o Peter Gutmann, Esquire
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D C 20006

FEDERAL COMMUNICATIONS COMMISSION

Magalie Román Salas
Secretary

¹⁸ Mr. Coleman and Phoenix are successors in interest to King Broadcasters, Inc. and Glacier Communications, Inc., two of the Petitioners first identified in paragraph 5, *supra*.

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Peninsula Communications, Inc.)	File No. EB 01-IH-0403
)	NAL/Acct No. 200132080060
Former licensee of FM translator stations)	
K285EF, Kenai, Alaska;)	
K283AB, Kenai/Soldotna, Alaska;)	
K257DB, Anchor Point, Alaska;)	
K265CK, Kachemak City, Alaska;)	
K272CN, Homer, Alaska; and)	
K274AB and K285AA, Kodiak, Alaska)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: August 23, 2001

Released: August 29, 2001

By the Commission:

1. In this Notice of Apparent Liability for Forfeiture and Order ("NAL"), we find that Peninsula Communications, Inc. ("Peninsula") has apparently violated Section 301 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 301. The apparent violations arise from continued operation of translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak subsequent to our order to terminate such operations. *See Peninsula Communications, Inc.*, FCC 01-159, released May 18, 2001 ("May 2001 MO&O").¹ We conclude that Peninsula is apparently liable for a forfeiture in the amount of one hundred forty thousand dollars (\$140,000). We also order Peninsula to submit an affidavit informing us whether Peninsula has ceased operating the above-captioned translators and whether it intends to operate those translators at any time in the future absent authorization to do so. In this regard, we note that continued unauthorized operation may lead to an order to show cause to revoke Peninsula's other Commission licenses.

I. BACKGROUND

2. This case involves our eligibility and licensing requirements for FM translators, which appear in 47 C.F.R. § 74.1232(d). Briefly, that subsection provides that authorization for an "other-area" or "non-fill-in" translator will not be granted to persons interested in or connected with the commercial

¹ That order also dealt with translators licensed to Peninsula, which are in Seward, Alaska. The operation of those translators is not pertinent to this NAL, and no further reference will be made to them.

"primary FM station."² These rules became effective on June 1, 1991, with pre-existing translators required to comply no later than June 1, 1994.³ As the Commission explained in establishing these rules, translators are intended to provide "supplementary service to areas in which direct reception of FM radio broadcast stations is unsatisfactory due to distance or intervening terrain barriers," and the governing rules are meant "to ensure that the translator service does not adversely affect the operation of FM radio broadcast operations." *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, *supra* note 3, 8 FCC Rcd at 5093.

3. Peninsula was the licensee of the captioned FM translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and 285AA, Kodiak, Alaska. All of those translator stations were non-fill-in stations that rebroadcast primary stations licensed to Peninsula. All of the translators, except the Kodiak translators, have been operated by Peninsula in violation of 47 C.F.R. § 74.1232(d) since at least June 1, 1994.⁴

4. In September 1996, the staff, in addressing petitions to deny filed against some of the translators' 1995 renewal applications,⁵ determined that Peninsula was operating the translator stations in violation of our translator rules' ownership restrictions. *See* 47 C.F.R. § 74.1232(d). Nevertheless, the staff deferred action on the 1995 renewal applications for a period of 60 days to allow Peninsula to file assignment applications in order to come into compliance with 47 C.F.R. § 74.1232(d). *See Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B4-AJS (Chief, Audio Services Division, Mass Media Bureau, September 11, 1996) ("*September 1996 letter*"). Ultimately, acceptable assignment applications were filed.⁶

5. On November 6, 1997, the staff granted the assignment applications, as well as Peninsula's 1995 renewal applications, conditioned upon consummation of the authorized assignments. In addition, the staff conditioned consummation of the assignments on grant of the recently-filed 1997 renewal

² An "other-area" or "non-fill-in" translator is one whose coverage contour extends beyond the protected service contour of its primary station. *See* 47 C.F.R. § 74.1201(h) and (i). A "primary" FM station is the station whose signal a translator retransmits. 47 C.F.R. § 74.1201(d).

³ *See Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212 (1990), *modified*, 6 FCC Rcd 2334 (1991), *recon. denied*, 8 FCC Rcd 5093 (1993).

⁴ The Kodiak translators ceased rebroadcasting Peninsula's KPEN-FM, Soldotna, and KWV-FM, Homer, Alaska, on November 12, 1997, and remained silent between that date and October 29, 1998. On October 29, 1998, the Kodiak translators began rebroadcasting the signal of a noncommercial FM translator in Kodiak in accordance with our translator rules. *See Peninsula Communications, Inc.*, 13 FCC Rcd 23992, 23998 n. 13 (1998) ("*December 1998 MO&O*"). However, in January 2001, Peninsula recommenced the rebroadcast of stations KPEN-FM and KWV-FM in violation of 47 C.F.R. § 74.1232(d). *See May 2001 MO&O* at p. 2, n. 4.

⁵ The challenged translator stations included K285EF, Kenai; K283AB, Kenai/Soldotna; and K274AB and K285AA, Kodiak.

⁶ Peninsula and Coastal Broadcast Communications, Inc. ("Coastal") originally filed applications to assign the translator stations on November 14, 1996. Those applications were dismissed as patently not in accordance with the Commission's rules. *See Letter to Jeffrey D. Southmayd, Esq., et al.*, Ref. No. 1800B3-BSH (Chief, Audio Services Division, Mass Media Bureau, June 17, 1997) ("*June 1997 Staff Decision*"). The June 1997 Staff Decision afforded Peninsula and Coastal ten business days to file assignment applications that would fully comply with the Commission's rules. Peninsula and Coastal did so on July 1, 1997.

applications. See *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B3-BSH (Chief, Audio Services Division, Mass Media Bureau, November 6, 1997) ("*November 1997 staff decision*"). The *November 1997 staff decision* stated that failure to meet the divestiture condition would render grant of the 1995 renewal applications null and void. Peninsula did not seek reconsideration or review of the *November 1997 staff decision*. However, other entities (collectively referred to as "Petitioners") filed both a petition for reconsideration and an application for review of the *November 1997 staff decision*.

6. In December 1998, the Commission dismissed and denied, respectively, Petitioners' petition for reconsideration and their application for review. See *December 1998 MO&O*. Essentially, Petitioners had argued that the staff should have revoked Peninsula's licenses because of the rule violations and that the staff erred in concluding instead that Peninsula could sell the subject translator stations. In our decision, we noted that, in the absence of an unresolved basic character qualification issue, "there can be no doubt as to the Commission's authority to cure or remedy [the violation of the ownership restrictions] by granting the renewal applications conditioned on divestiture of the translators." *December 1998 MO&O*, 13 FCC Rcd at 23996. In the *December 1998 MO&O*, we also granted Peninsula's 1997 renewal applications,⁷ conditioned on consummation of the authorized assignments, and denied requests for waiver of 47 C.F.R. § 74.1231(b), the over-the-air delivery restrictions, filed by Coastal for the Kodiak translators.⁸

7. Peninsula and Glacier Communications, Inc. sought reconsideration of the *December 1998 MO&O*. Peninsula disputed, for the first time, the conditional grants of the 1995 and 1997 renewal applications and the determination that the seven subject translators had been operating in violation of 47 C.F.R. § 74.1232(d) since June 1, 1994. In addition, Peninsula, but not Coastal, requested reconsideration of the denial of requests for waivers of 47 C.F.R. § 74.1231(b) for the Kodiak translators.

8. On February 14, 2000, we dismissed Peninsula's petition for reconsideration of the *December 1998 MO&O*. *Peninsula Communications, Inc.*, 15 FCC Rcd 3293 (2000) ("*February 2000 MO&O*"). We ordered Peninsula to consummate the authorized assignments within thirty days of the decision, and we directed the staff to rescind the conditional grants of the 1995 and 1997 license renewal applications, cancel the relevant call signs and terminate the translators' operating authority if Peninsula did not comply with the divestiture requirement. *February 2000 MO&O*, 15 FCC Rcd at 3294, 3296. On February 23, 2000, Peninsula filed with the Commission a motion to stay the effect of the *December 1998 MO&O* and the *February 2000 MO&O* pending the filing and resolution of an appeal it intended to file.

9. On March 8, 2000, Peninsula filed an appeal of the Commission's *February 2000 MO&O* with the United States Court of Appeals for the District of Columbia Circuit ("Court"). That same day, Peninsula filed an Emergency Motion for Stay of the *February 2000 MO&O* with the Court. On March 14, 2000, the Court denied Peninsula's Emergency Motion for Stay. The next day Peninsula filed with the Commission a pleading styled "Rejection of Conditional License Renewal and Assignment of

⁷ The brevity of the time period between the filing of the 1995 and 1997 renewal applications was the result of the Commission's decision to modify FM translator license terms to run concurrently with the terms of FM primary stations. See *In the Matter of Modifying Renewal Dates for Certain Stations Licensed under Part 74 of the Commission's Rules and Revising FCC Form 303-S, Report and Order*, 9 FCC Rcd 6504 (1994).

⁸ 47 C.F.R. § 74.1231(b) provides that other-area or non-fill-in translators may only retransmit primary FM station signals received by the translator directly over-the-air.

License Grants" ("Rejection of Conditional Grants"). By order dated July 11, 2000, the Court dismissed Peninsula's appeal without prejudice to refiling following the Commission's resolution of the "Rejection of Conditional Grants."

10. In our *May 2001 MO&O*, we dismissed as untimely Peninsula's "Rejection of Conditional Grants." In addition, we rescinded the 1995 and 1997 conditional grants of renewal; rescinded the conditional grants of assignment; dismissed the 1995 and 1997 renewal applications; dismissed the 1997 assignment applications; canceled the call signs and terminated Peninsula's operating authority for the seven captioned translator stations. In this regard, we ordered Peninsula to terminate operations for the translator stations effective at 12:00 midnight on the day after release of that order, and we warned Peninsula that further operations by it after that time may subject it to serious sanctions, including but not limited to forfeitures.⁹ Thus, in order to comply with our *May 2001 MO&O*, Peninsula was obligated to cease operations by 12:00 midnight on May 19, 2001.

11. Commission records reflect that Peninsula and its counsel were served with our *May 2001 MO&O* on May 21, 2001, and that Peninsula itself was served with the *May 2001 MO&O* no later than May 30, 2001. Nonetheless, information provided to the Commission by our field personnel in Alaska and by competitors indicates that Peninsula has not shut down any of the translators and is continuing to broadcast the signals of its primary stations. In addition, Peninsula's counsel has informed Commission staff in a telephone conversation that Peninsula has no intention of terminating its operations on the captioned translators.

II. DISCUSSION

12. Section 301 of the Act, 47 U.S.C. § 301, prohibits radio operation "except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." As explained above, Peninsula's licenses for the seven captioned translators were canceled as of midnight May 19. Nevertheless, Peninsula has continued to operate those stations in apparent defiance of our order to terminate such operations.

13. Section 503(b)(1) of the Act, 47 U.S.C. § 503(b)(1) provides that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or a Commission order shall be liable for a forfeiture penalty.¹⁰ In this context, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Communications Act,¹¹ while "repeatedly" means more than once.¹² The information before us clearly reflects that Peninsula has knowingly operated its translators subsequent to receipt of a direct order from us to stop. It thus appears that Peninsula's violations with respect to unauthorized operations were not only willful but also were intentional. It further appears that each of the violations described occurred on more than one day; thus, they were repeated.

⁹ See *May 2001 MO&O* at p. 7, ¶ 13.

¹⁰ See also section 1.80(a)(1) and (2) of the Commission's rules, 47 C.F.R. § 1.80(a)(1) and (2).

¹¹ See *Jerry Szoka*, 14 FCC Rcd 9857, 9865 (1999), *recon. denied*, 14 FCC Rcd 20147 (1999), *petition for review pending sub nom. Grid Radio and Jerry Szoka v. FCC*, No. 99-1463 (D.C. Cir. November 17, 1999); *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹² See *Hale Broadcasting Corp.*, 79 FCC 2d 169, 171 (1980).

14. In assessing a forfeiture, we take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), which include the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. The Commission's forfeiture guidelines currently establish a base amount of \$10,000 for operation without an instrument of authorization for the service.¹³ It appears that Peninsula has willfully and repeatedly operated seven stations without authorization, thereby bringing the total base amount of the forfeiture to \$70,000. In considering whether adjustments are appropriate, it further appears that Peninsula has unlawfully operated the translators following receipt of our *May 2001 MO&O*, which unequivocally ordered Peninsula to cease operations by midnight May 19, 2001. It thus appears that Peninsula's unauthorized operation has been intentional, which warrants an upward adjustment of the forfeiture amount.¹⁴ Moreover, we are not currently aware of any facts that would mitigate Peninsula's apparent violations. Accordingly, we believe that a \$140,000 forfeiture is appropriate.

15. Finally, in light of Peninsula's apparent defiance of our *May 2001 MO&O*, we hereby notify Peninsula that further violation of Section 301 of the Act and our *May 2001 MO&O* may raise serious questions about Peninsula's qualifications to be a Commission licensee. It thus may be necessary to institute further proceedings pursuant to Section 312(a) of the Act, 47 U.S.C. § 312(a), with respect to its full service radio station licenses and other translator station licenses. Such proceedings could lead to issuance of an order revoking one or more of those licenses. In this regard, we emphasize that the mere pendency of an appeal of our *May 2001 MO&O* will not suffice to avoid further enforcement action.¹⁵ To assist the Commission in making a determination whether such a proceeding should be instituted, Peninsula is ordered to file with the Commission's Secretary, with a copy to the Chief, Enforcement Bureau, an affidavit by an officer or director indicating (1) whether Peninsula has ceased operating the relevant translator stations; and (2) whether it intends to operate the relevant translator stations at any time in the future absent further Commission or court action giving it authority to do so. Such affidavit shall be filed no later than 10 days from the release of this order.

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, Peninsula Communications, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of one hundred forty thousand dollars (\$140,000) for violating Section 301 of the Act, 47 U.S.C. § 301, by operating the seven captioned translator stations subsequent to midnight May 19, 2001.

17. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules, 47

¹³ See section 1.80 of the Commission's rules, 47 C.F.R. § 1.80 (note to paragraph (b)(4)). See also *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

¹⁴ See *M.C. Allen Productions*, Notice of Apparent Liability, DA 01-1166 (Enforcement Bureau May 9, 2001); *WRHC Broadcasting Corp.*, Notice of Apparent Liability, 15 FCC Rcd 5551 (Enforcement Bureau 2000) (subsequent history omitted).

¹⁵ See, e.g., 47 U.S.C. § 416 ("It shall be the duty of every person . . . to observe and comply with such orders so long as the same shall remain in effect").

C.F.R. § 1.80, within thirty days of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE, Peninsula Communications, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

18. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above.

19. The response, if any, must be mailed to the Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, 445 12th Street, S.W., Washington, D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

21. Requests for payment of the full amount of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁶

22. IT IS FURTHER ORDERED THAT, no later than 10 days after release of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER, Peninsula shall file with the Secretary of the Commission, with a copy to the Chief, Enforcement Bureau, an affidavit signed by one of its officers or directors indicating (1) whether Peninsula has ceased operating each and every one of the above-captioned translator stations; and (2) whether Peninsula intends to operate any or all of the above-captioned translator stations at any time in the future absent further Commission or court action giving it authority to do so.

23. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER shall be sent by Certified Mail Return Receipt Requested to Peninsula Communications, Inc., Post Office Box 109, Homer, Alaska 99603, with a copy to Jeffrey D. Southmayd, Esquire, Southmayd & Miller 1220 19th Street, N.W., Suite 400, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁶ See 47 C.F.R. § 1.1914.

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FILED*Official Notice Ex. 15*
SEP 24 2001

RECEIVED

US ATTORNEY OFFICE: UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA01 SEP 24 PM 4 18 By FRZ Deputy**UNITED STATES DISTRICT COURT****DISTRICT OF ALASKA****UNITED STATES OF AMERICA,****Plaintiff,****vs.****PENINSULA COMMUNICATIONS,
INC.,****Defendant.****A01-207 CV (JWS)****ORDER FROM CHAMBERS****[Re: Motion for Preliminary
Injunction - Docket 2]****I. MOTION PRESENTED**

At docket 2, plaintiff the United States of America ("United States") seeks a preliminary injunction to enjoin defendant Peninsula Communications, Inc. ("PCI") from making any radio transmissions in the United States without first obtaining a license from the Federal Communications Commission ("FCC"). PCI opposes the motion. Oral argument has not been sought and would not assist the court.

II. BACKGROUND

The FCC granted license renewal applications filed by PCI subject to the express condition that PCI divest itself of certain FM translator stations located at various locations on the Kenai Peninsula and Kodiak, Alaska. PCI failed to divest itself of the subject stations. The FCC therefore issued an order on May 18, 2001, rescinding the conditional grants of PCI's renewal applications. Subsequent monitoring established that PCI has continued to operate the stations. PCI appealed the FCC's order to the United States Court of Appeals for the District of Columbia Circuit. That appeal is still

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pending. The court, however, has already denied a motion to stay proceedings pending appeal. Meanwhile, the United States has brought this action seeking declaratory relief that the FCC's May 18, 2001 order was regularly made and duly served, and enjoining PCI from violating the order. Other facts and the court's analysis are discussed below.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 65 authorizes injunctive relief under certain specified conditions. "Preliminary injunctive relief is appropriate when a plaintiff establishes (1) probable success on the merits and irreparable harm if relief is denied, or (2) that there are serious questions on the merits and the balance of hardship tips sharply in favor of plaintiff."¹ The test represents "a single continuum of concern which evaluates two factors that must always be considered: 'The likelihood of the plaintiff's success on the merits; and the relative balance of potential hardships to the plaintiff, defendant, and public.'"² Analysis is affected by the relative probability of success and potential hardship: "[t]he higher a plaintiff's probability of success, the less the balance of hardship need tip in plaintiff's favor to support issuance of an injunction."³

IV. DISCUSSION

Based on the record before the court, there seems to be no serious question but that the FCC issued a valid order requiring PCI to suspend operating the subject stations in question, and that PCI has disobeyed the FCC's order. Thus, as a question of preliminary injunctive relief, and recognizing that the court is not entering findings

¹*Rowe v. Burton*, 844 F. Supp. 1372, 1375 (D. Alaska 1994) (citing *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 602 (9th Cir. 1991)).

²*Id.* (quoting *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988)).

³*Id.*

supporting a final judgment, the United States is entitled to the preliminary injunctive relief it seeks because the court agrees that "it is [not] proper to allow a company to continue to operate radio transmitters after their license [is] revoked" and there is no serious argument that PCI holds a license with continued validity.

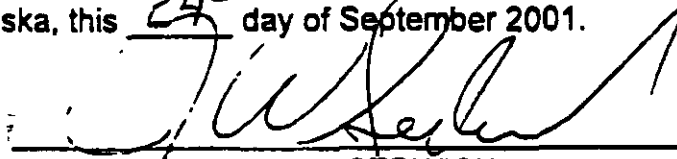
PCI argues that only the United States Court of Appeals for the District of Columbia Circuit has the expertise to properly evaluate PCI's likelihood of success on appeal. Perhaps so, but that is a matter before the Court of Appeals. PCI points to no evidence or argument establishing that there are serious questions on the merits. Regarding the relative balance of potential hardships, PCI contends that it will lose all licenses if the pending appeal is not resolved in a year. But that is an argument more appropriately made to the Court of Appeals. Furthermore, there is no evidence that PCI has attempted to expedite proceedings before the Court of Appeals.

In short, based on the record before this court, the United States is entitled to a preliminary injunction. No part of this court's order could or will impair PCI's ability to move for a stay pending appeal before the United States Court of Appeals for the District of Columbia Circuit.

V. CONCLUSION

For the foregoing reasons, the United States' motion for a preliminary injunction at docket 2 is **GRANTED**. The United States will please lodge a proposed form of injunction for the court's consideration.

DATED at Anchorage, Alaska, this 24th day of September 2001.



JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

⁴See Opposition to Motion to Stay, docket 14, at p. 2.